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SERVICE DATE - MAY 21, 1999

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-547X

ROARING FORK RAILROAD HOLDING AUTHORITY
—ABANDONMENT EXEMPTION—
IN GARFIELD, EAGLE, AND PITKIN COUNTIES, CO

Decided: May 19, 1999

By decision and notice of interim trail use or abandonment served October 16, 1998 (October 16 decision), we granted Roaring Fork Railroad Holding Authority (RFRHA) an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903 to abandon a 33.44-mile line of railroad known as the Aspen Branch, extending from milepost 360.22 near Glenwood Springs to the end of the line at milepost 393.66 near Woody Creek, in Garfield, Eagle, and Pitkin Counties, CO, subject to the offer of financial assistance (OFA) provisions of 49 U.S.C. 10904, as well as trail use, historic preservation, environmental, and employee protective conditions. RFRHA had requested an exemption from the OFA process, but we denied that request as unsupported.

On October 26, 1998, Morris H. Kulmer and Kern W. Schumacher (the offerors) timely filed an OFA to purchase the line. By decision served October 30, 1998 (October 30 decision), the Director of the Office of Proceedings postponed the effective date of the exemption in order to permit the OFA process to proceed.¹ On November 5, 1998, RFRHA filed a motion to dismiss the OFA on the ground, inter alia, that the offerors do not have good faith plans to provide continued rail service

¹ The October 30 decision stated that, if RFRHA and the offerors could not agree on the purchase price of the line, either party could request the Board to establish the terms and conditions of the purchase on or before November 25, 1998. On November 3, 1998, RFRHA filed a motion to extend the time for it to respond to any request to set terms and conditions until December 4, 1998, and on November 10, 1998, offerors asked that we postpone indefinitely the due date for submitting their request to set terms and conditions.

on the line,² as well as an appeal of the October 30 decision.³ Offerors and the Board of County Commissioners of Garfield County, CO (Garfield County), replied.⁴

In this decision, we dismiss the OFA.⁵

PRELIMINARY MATTERS

Conflict of Interest. A collateral dispute has arisen concerning an alleged conflict of interest involving an attorney representing offerors. Before the petition for exemption was filed, RFRHA's counsel, who was not familiar with the Board's procedures, contacted an attorney with such experience, for a consultation regarding the best course of action with respect to the line of railroad at issue.⁶ The attorney who was contacted, Fritz Kahn, advised filing a petition for exemption of the abandonment of the line. He was paid (by RFRHA's counsel) for his time spent consulting on the matter, and then, according to RFRHA, it substantially followed his advice. Subsequently, Mr. Kahn filed an OFA on behalf of the offerors.

RFRHA argues that there is an apparent conflict of interest and that the OFA filing was made with the benefit of confidential information disclosed to Mr. Kahn in the course of his consultation. RFRHA has moved to strike all pleadings filed by Mr. Kahn on behalf of offerors in

² RFRHA bases this claim on the fact that the offerors are associated with A&K Railroad Materials Company, a salvage company that is in the business of acquiring rail lines that have been or are being abandoned and selling the rail for scrap. The Colorado Department of Transportation (CDOT) and the City of Glenwood Springs (the City) join in RFRHA's motion to dismiss.

³ By decision served November 25, 1998, the due date for requests to establish terms and conditions was postponed pending a decision on the motion to dismiss the OFA and the appeal of the October 30 decision.

⁴ Numerous additional statements have been submitted, including filings by Orrison Distributing, LTD. (Orrison); Valley Lumber Company (Valley Lumber); W/J Ranch, Inc. (W/J); Sanders Ranch Holdings, LLC; and the City.

⁵ In light of our decision, all unresolved discovery matters, including offerors' motion to compel, and all motions to strike improperly filed pleadings are denied as moot.

⁶ RFRHA's counsel may or may not have specifically identified RFRHA as his client. RFRHA's counsel seeks a protective order allowing him to submit, under seal and in a manner that would not publicly disclose privileged, attorney-client communications, evidence as to his version of the consultation. In view of our disposition of this matter, we will not pursue the issue in the context of this proceeding. Accordingly, the motion seeking a protective order is denied.

this matter.⁷ In light of these charges, Mr. Kahn, while denying any conflict of interest, has withdrawn as counsel for offerors, with his clients' permission.

Under our Canons of Ethics for practitioners before the Board, "[t]he obligation to represent the client with undivided fidelity and not to divulge secrets or confidence forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed." 49 CFR 1103.16(c). The sanction for conduct in violation of this canon, within the context of a proceeding, is removal of counsel.⁸ Because Mr. Kahn has withdrawn from representing offerors in this proceeding, RFRHA has already received all the relief to which it would be entitled in this case if the allegations against Mr. Kahn were proven. Accordingly, we need not further address the conflict of interest allegations here.

Emergency Relief. During the course of this proceeding, offerors sought emergency relief to compel RFRHA to cease and desist from allegedly unlawful actions to sever the rail line. In one instance, an easement was granted for trail purposes over a portion of the right-of-way that does not cross the line of railroad at issue. In a second instance, an easement was granted for a grade crossing as part of a settlement of condemnation proceedings under state law. Neither of these actions in any way constitutes a "severance" of the line of railroad. They are ordinary activities, fully consonant with the usual operations of a railroad, that place no burden upon maintaining transportation services.

In a third instance, it appears that a highway reconstruction project by CDOT has obstructed the rail line beyond Carbondale, CO, an obstruction that apparently will continue for some period of time. That portion of the railroad, however, has been under embargo for at least a decade, since before RFRHA acquired the line. RFRHA has no control over the highway project, but has acted

⁷ Mr. Kahn has petitioned for leave to file a personal reply, in response to the allegations made against him, and RFRHA has moved to deny that petition and to strike the reply. Mr. Kahn has a right to defend himself against the conflict of interest charge, and his reply is therefore accepted for filing.

⁸ Dismissal of the OFA, as advocated by RFRHA, is generally not an appropriate sanction. See W.T. Grant Co. v. Haines, 531 F.2d 671, 676 (2d Cir. 1976) ("sins of counsel" are not generally visited upon the client so as to vitiate the latter's cause of action); accord, Arons v. Lalime, No. 6: 94-CV-7618 CJS(H), 1998 U.S. Dist. LEXIS 20342 at *23-24 (W.D.N.Y. Oct. 8, 1998). As far as striking the pleadings submitted by Mr. Kahn is concerned, any allegedly confidential information contained in these pleadings has already been disclosed and placed on the public record. Moreover, we do not rely upon any allegedly confidential information in reaching our determinations in this decision. Therefore, striking the pleadings would serve no useful purpose. Similarly, RFRHA has shown no need for an order barring any further disclosure by Mr. Kahn or substitute counsel (Michael Van Wagenen).

appropriately to protect its interests and responsibilities by negotiating with CDOT a commitment to restore the track and to indemnify RFRHA at the conclusion of the project.⁹

We find that offerors have failed to allege any facts upon which emergency relief may be granted, and, therefore, deny such relief.

Garfield County. RFRHA has moved to strike certain aspects of Garfield County's submissions,¹⁰ both with regard to the issue of alleged severance of the rail line (discussed above) and with regard to certain material allegedly covered by attorney-client privilege (similar to the material involved in the conflict-of-interest issue, also discussed above). No useful purpose would be served by striking any of this material. The allegedly privileged material was apparently sent to Garfield County by RFRHA and has been on the county's public records for some months already, and thus has not, in any real sense, been "disclosed" in this proceeding.

DISCUSSION AND CONCLUSIONS

The OFA process is designed for the purpose of continuing to provide freight rail service, and is not to be used to obstruct other legitimate processes of law (whether Federal, state, or local) when continuation of such service is not likely. See The Land Conservancy of Seattle and King County—Acquisition and Operation Exemption—The Burlington Northern and Santa Fe Railway Company, STB Finance Docket No. 33389 et al., slip op. at 13 (STB served May 13, 1998).¹¹ Accordingly, when disputed, an offeror must be able to demonstrate that its OFA is for continued rail freight service. Union Pacific Railroad Company—Abandonment Exemption—In Lancaster County, NE, Docket No. AB-33 (Sub-No. 71X) (ICC served Sept. 28, 1992); Conrail Abandonment West 30th Street, NY, Docket No. AB-167 (Sub-No. 493N) (ICC served Jan. 13, 1987). Where, as here, the line is not currently active, there must be some assurance that shippers are likely to make use of the line if continued service is made available, and that there is sufficient traffic to enable the operator to fulfill its commitment to provide that service. See The Burlington Northern and Santa Fe Railway Company—Abandonment Exemption—In King County, WA, STB

⁹ The project contemplates a grade-separated crossing, in conjunction with projected light-rail service or, upon reasonable request, freight service.

¹⁰ Garfield County was a member of RFRHA when that entity was formed, but subsequently withdrew its membership. It now advocates private ownership of the Aspen Branch to provide both freight and passenger service.

¹¹ Pending review in The Land Conservancy of Seattle v. STB, Nos. 98-70776 and 98-71348 (9th Cir. filed July 10, 1998).

Docket No. AB-6 (Sub-No. 380X), slip op. at 5 (STB served Aug. 5, 1998).¹² The record in this case does not provide such assurances.

Of the five potential shippers that have been identified here, three are not even in a position to use the line. GMCO has moved its facility to a location off the line.¹³ Valley Lumber is apparently situated on the opposite side of a waterway, and the cost of constructing a siding and bridge to serve its location would appear to be economically impracticable for the low volume of traffic projected for it.¹⁴ W/J appears to be located on a right-of-way long since abandoned and beyond the scope of this proceeding.¹⁵ The traffic projections for the other two potential shippers that have been mentioned--Orrison¹⁶ and ECDC Environmental (ECDC)¹⁷--are too indefinite and insufficient to support continued freight rail operations, as the offerors readily concede.

Indeed, the offerors acknowledge that continued freight service would not be self-sustaining and that their objective in seeking to acquire the line is the same as the RFRHA's own plans for the right-of-way (the plans for which RFRHA had sought an exemption from the OFA process). Accordingly, it is not appropriate for us to force the sale of the line based on the offer that has been submitted, as the statutory objective of continued freight rail service would not be likely to result from this OFA proposal. It would be inappropriate and unfair to permit use of the OFA process to wrest the right-of-way away from one person desiring to use it for a valid public purpose and give it to another person to be put to use for the identical public purpose.

¹² Pending review in Redmond-Issaquah Railroad Preservation Ass'n v. STB, No. 98-70906 (9th Cir. filed Aug. 12, 1998).

¹³ See statement of Robert L. Banks, transportation economist, attached to RFRHA's December 7, 1988 response to Garfield County's pleading. GMCO had only minimal traffic on the line in the past (19 carloads in 1996 and 1 carload in 1997).

¹⁴ Valley Lumber apparently has not used the Aspen Branch in the past, and offers (in mere generalities) a potential of only between 10 and 20 rail cars of traffic per year.

¹⁵ W/J professes a need for rail services to its housing project located 11 miles south of Basalt. However, the housing project has been denied permit approval by Pitkin County.

¹⁶ Orrison's stated traffic requirements average no more than one carload per week, and it has not produced nearly this volume of traffic in the past.

¹⁷ The offerors assert that ECDC has expressed an interest in moving 300 to 400 cars annually of waste materials from Carbondale to a landfill in Utah. ECDC has not come forward, however, to corroborate this claim. Moreover, the offerors concede that this amount of traffic would not justify the costs that they would need to incur in order to provide rail freight service. Offerors' reply to RFRHA's November 5, 1998 appeal, at 10-11.

Moreover, based upon the additional information we now have concerning both RFRHA's plans for this line and the lack of interest in continued freight rail service, we believe that it would have been appropriate to exempt this line from the OFA process. An exemption from the OFA provisions of 49 U.S.C. 10904 is appropriate where the right-of-way is needed for a valid public purpose and there is no overriding public need for continued (freight) rail service. Norfolk and Western Railway Company—Abandonment Exemption—In Cincinnati, Hamilton County, OH, STB Docket No. AB-290 (Sub-No. 184X), slip op. at 11 (STB served May 13, 1998). Following consummation of the abandonment, RFRHA plans to rehabilitate and reconstruct the line for light-rail passenger service.¹⁸ Congress has already made a preliminary authorization of \$40 million for the light-rail passenger service project,¹⁹ which is expected to relieve traffic congestion between Glenwood Springs and Aspen, CO. Based on this new information, it is clear that the property is needed for a valid public purpose and that there is not an overriding public need for continued freight rail service.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The OFA tendered by Morris H. Kulmer and Kern W. Schumacher is dismissed.

¹⁸ RFRHA states that future freight service, if required, could be restored as an adjunct to passenger service. RFRHA could, of course, reinstitute rail freight service upon obtaining an appropriate certificate under 49 U.S.C. 10901. However, our decision here is in no way contingent upon the representation that rail service may be reinstituted if there is a sufficient demand for such service.

¹⁹ If the line is forced to be sold to a third party under the OFA process, that funding would apparently not be available. Accordingly, RFRHA argues that pursuit of the OFA process would thwart preservation of the line for development of the needed light-rail project. Moreover, we note that, in view of the Federal funding that RFRHA has lined up for that purpose, this case presents the anomalous situation in which any future reinstitution of rail freight service (as an adjunct to passenger service) appears to be more likely under RFRHA's own plans for the future of the right-of-way than through the OFA process.

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2. All other relief is granted, denied, or dismissed as moot, as discussed in this decision.
3. The October 30, 1998, decision is vacated.
4. This decision is effective June 20, 1999.

By the Board, Chairman Morgan, Vice Chairman Clyburn and Commissioner Burkes.

Vernon A. Williams
Secretary